

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
for Verification, Consolidation, and Approval of
Costs and Revenues in the Transition Revenue
Account.

Application 98-07-003
(Filed July 1, 1998)

**DECISION AWARDING INTERVENOR COMPENSATION
TO THE UTILITY REFORM NETWORK (TURN)**

This decision awards The Utility Reform Network (TURN) \$ 44,140.50 for its contribution to Decision (D.) 01-09-060, D.02-07-032, D. 03-02-035, D.03-08-061, D.03-09-016, and Resolution E-3790 (November 7, 2002). This is the full amount of TURN's request, corrected for typographical errors.

1. Background

The decisions and resolution for which TURN seeks compensation concern the suspension of direct access, determining the direct access credit since the demise of the Power Exchange (PX), and establishing a historical procurement charge (HPC) to recover a portion of the cost of the Procurement Related Obligation Account (PROACT) from Southern California Edison Company's (Edison) direct access customers. Further details concerning these decisions and resolution are discussed in the substantial contribution section below.

No party opposes TURN's request for compensation.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-12. (Unless otherwise noted, all statutory citations are to the Public Utilities Code.)

A. Timeliness of Notice of Intent

Section 1804(a) requires an intervenor (also termed “customer” in the statute) to file a notice of intent (NOI) to claim compensation within 30 days after the prehearing conference or by a date established by the Commission. The NOI must present information regarding the nature and extent of the customer’s planned participation and an itemized estimate of the compensation the customer expects to request. The NOI may request a finding of eligibility for compensation.

Here, TURN filed a timely NOI on September 21, 1998. The Administrative Law Judge (ALJ) issued an October 13, 1998 ruling finding TURN eligible for compensation in this proceeding. In D.99-11-049, 1999 Cal. PUC LEXIS 868, the Commission granted TURN an award of compensation for its work in the earlier phase of this proceeding.

B. Customer Status

Pursuant to D.98-04-059, this decision must determine whether the intervenor is a customer, as defined in § 1802(b), and whether the intervenor is (1) a participant representing consumers, (2) a representative authorized by a customer, or 3) a representative of a group or organization that is authorized by

its bylaws or articles of incorporation to represent the interests of residential ratepayers.¹

TURN meets the third definition of customer, as set forth in § 1802(b): it is a group or organization that is authorized by its bylaws or articles of incorporation to represent the interests of residential ratepayers.² TURN is organized to represent and advocate the interests of consumers of public utility services in California. TURN qualifies as a customer because it is an organization authorized by its articles of incorporation to represent the interests of consumers, a portion of which are residential customers.

C. Significant Financial Hardship

Only those customers for whom participation or intervention would impose a significant financial hardship may receive intervenor compensation. Section 1804(a)(2)(B) allows the customer to include a showing of significant financial hardship in the NOI. Section 1802(g) defines “significant financial hardship”:

“Significant financial hardship” means either that the customer cannot without undue hardship afford to pay the costs of effective participation, including advocate’s fees, expert witness fees, and other reasonable costs of participation, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in

¹ “When filing its Notice of Intent, a participant should state how it meets the definition of customer: as a *participant* representing consumers, as a *representative* authorized by a customer, or as a representative of a *group or organization* that is authorized by its bylaws or articles of incorporation to represent the interests of residential customers.” D.98-04-059, *mimeo.*, at 28-29 (emphasis in original).

² See D.03-10-071 at 3-4.

comparison to the costs of effective participation in the proceeding. Alternatively, the customer may make the required showing in the request for an award of compensation.

A rebuttable presumption of eligibility exists for TURN. The October 13, 1998 ALJ ruling found that TURN had demonstrated significant financial hardship in its NOI. No party has attempted to rebut that presumption.

D. Timeliness of Compensation Request

Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. The Commission issued D.03-09-016 (resolving a petition for modification) by mail on September 5, 2003. TURN timely filed its request for an award of compensation on November 3, 2003.

3. Substantial Contribution to Resolution of Issues

Under § 1804(c), an intervenor requesting compensation must provide “a detailed description of services and expenditures and a description of the customer’s substantial contribution to the hearing or proceeding.”

Section 1802(h) states that “substantial contribution” means that,

in the judgment of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

As provided in § 1802(h), a party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision, or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted. A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total.³

TURN alleges that its involvement was extensive and included participation in hearings and preparation of numerous rounds of comments, testimony, briefs, an application for rehearing, and a protest to a compliance advice letter filing. Although, according to TURN, it was not successful on every argument presented, the decisions reflect the significant impacts of TURN's advocacy. TURN also states that when its position did not prevail, it was nonetheless embraced by either the ALJ's proposed decision or an alternate decision supported by one or more Commissioners.

³ The Commission has provided compensation even when the position advanced by the intervenor is rejected. *See* D.89-03-063, 1989 Cal. PUC LEXIS 195 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

We now discuss TURN's contributions to the specific decisions and resolution for which it requests compensation.

A. Substantial Contribution to D.01-09-060 (Suspension of Direct Access)

D.01-09-060 suspended the right of customers to enter into new direct access contracts effective immediately. TURN was the only customer representative that supported the immediate suspension, and a large number of parties opposed or sought further delay of the suspension. TURN's support of the suspension made a substantial contribution to D.01-09-060.

B. Substantial Contribution to D.02-07-032, D.03-02-035, D.03-09-016, and Resolution E-3790 (November 7, 2002)

TURN was the only active customer representative that supported Edison's request to establish a HPC to recover from direct access customers a portion of the cost of the Commission's federal court settlement with Edison. This settlement allowed Edison to recover its past procurement cost undercollections as measured by the staring balance in Edison's PROACT. D.02-07-032 adopted a HPC, but at a lower level than TURN recommended. The ALJ's proposed decision, which was supported by two dissenting Commissioners, would have adopted the higher amount which TURN supported. D.02-07-032 also accepted certain of TURN's technical comments on the proposed decision. Finally, Resolution E-3790 (November 7, 2002) adopted TURN's position in its protest of the HPC implementation advice letter. This resolution exempted residential usage below 130% of baseline, California

Alternative Rates for Energy (CARE), and medical baseline direct access customers from liability for the HPC.⁴

Subsequently, TURN applied for rehearing of D.02-07-032 on several grounds. In D.03-02-035, the Commission denied rehearing, but noted that two issues TURN raised, namely, what amount should be recovered from direct access customers through the HPC, and what interest rate to use for the HPC, would be addressed in connection with Edison's then pending petition for modification of D.02-07-032. (*See* 2003 Cal.PUC LEXIS 93 *42.)

D.03-09-016 addressed Edison's petition for modification, which TURN supported, and increased the amount of the HPC to \$473 million, \$20 million less than the figure TURN supported. The decision found that the evidence is convincing that direct access customers made equivalent contributions to Edison's undercollection, thereby validating TURN's primary contention in the proceeding. The Commission also adopted TURN's proposed interest rate on the HPC balance.

**C. Substantial Contribution to D.03-08-061
(Post-PX Direct Access Credits)**

TURN stated in both its opening and rebuttal testimony on the post-PX direct access credit that the question of the appropriate derivation of the credit is closely related to the issue of the appropriate exit fees for direct access customers.

⁴ We may award compensation for work related to Commission Resolutions. (*See* D.98-11-049, 83 CPUC2d 93.)

While the direct access credit issue was pending in this application, the Commission adopted the cost responsibility surcharge for direct access customers in Rulemaking 02-01-011. That action eliminated many of the disputed issues in the post-PX direct access credit phase of this proceeding.

D.03-08-061 adopted TURN's primary surviving recommendation, namely, that Pacific Gas and Electric Company (PG&E) be required to keep an accounting of the relative contributions of its bundled and direct access customers to the "headroom" PG&E is accumulating and is likely to use to pay off its creditors as part of any approved bankruptcy reorganization plan. (*See* Ordering Paragraph 3 at 1998 Cal. PUC LEXIS 1113 *29.)

D. Conclusion on Substantial Contribution

We agree based on the foregoing summary that TURN made a substantial contribution to D.01-09-060, D.02-07-032, D.03-02-035, D.03-08-061, D.03-09-016 and Resolution E-3790. We address the reasonableness of the compensation amount TURN requests in the next section.

4. The Reasonableness of Requested Compensation

TURN requests \$44,140.50⁵ as follows:

Attorneys' Fees

M. P. Florio	8.00 Hours	X	\$350 (2001) =	\$2,800.00
M. P. Florio	63.0 Hours	X	\$385 (2002) =	\$24,255.00
M. P. Florio	26.5 Hours	X	\$435 (2003) =	\$11,527.50 ⁶
M. P. Florio	4.0 Hours	X	\$217.50 ⁷ (2003) =	\$870.00
			(Comp.)	
R. Finkelstein	5.0 Hours	X	\$310 (2001) =	\$1,550.00
M. Hawiger	0.5 Hours	X	\$200 (2002) =	\$ 100.00
			Subtotal =	\$41,102.50

Other Reasonable Costs

Copies	=	\$2,418.00	
Postage	=	\$620.00	
		Subtotal =	\$ 3,038.00
		Total Requested =	\$44,140.50

A. Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer must demonstrate that its participation was “productive,” as that term is used in § 1801.3, where the Legislature gave the Commission guidance on program

⁵ TURN’s application requests \$44,140.00, but we correct this amount because of a typographical error as discussed below.

⁶ TURN’s application makes a typographical error and lists this amount as \$11,527.00. We correct this amount to conform to the actual hours worked times the claimed hourly rate.

⁷ Florio appropriately requests half of his requested hourly rate for his work on the compensation request. Half of Florio’s requested hourly rate of \$435 for 2003 is \$217.50, not \$217, as TURN sets forth, and we make this correction here.

administration. In that decision, we discuss the requirement that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. Customers are directed to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

TURN notes that it would be extremely difficult to assign a dollar value to this proceeding or its contribution, because this proceeding dealt primarily with allocating costs among different types of customers, and total utility revenue requirements were not at issue. While it is difficult to establish a particular dollar amount for some portions of this proceeding, on the HPC issue alone, TURN's participation contributed to the assignment of \$473 million in costs to direct access rather than bundled service customers. This assignment of cost responsibility was appropriate, and saved the corresponding amount for bundled service customers, which include the residential ratepayers TURN represents. We find that TURN's work was productive.

B. Hours Claimed

TURN documents its claimed hours by presenting a daily breakdown of the hours of its attorneys, accompanied by a brief description of each activity. The hourly breakdown reasonably supports the claim for total hours.⁸

As noted earlier, the Commission has awarded full compensation even where the intervenor's positions were not adopted in full, especially in

⁸ As the Commission requires, TURN seeks compensation at half the usual hourly rate for hours devoted to the preparation of this compensation request.

proceedings with a broad scope. (*See* D.98-04-028, 79 CPUC2d 570, 573-574.)

Here, TURN achieved a high level of success on the issues it raised. In the areas where we did not adopt TURN's position in whole or in part, we benefited from TURN's analysis and discussion of all of the issues which it raised. Since we find that TURN's efforts made a substantial contribution to the delineated decisions, we need not exclude from TURN's award compensation for certain issues.

However, we note that TURN broke down its efforts by issue; had we needed to eliminate certain issues from the award, this breakdown would have facilitated the process.

C. Hourly Rates

1. Michel P. Florio

TURN seeks an hourly rate of \$350 for work performed by Florio in 2001, and \$385 for his work in 2002. The Commission has previously approved each of these rates for work performed by Florio in those years, and we find these rates reasonable.⁹

TURN seeks an hourly rate of \$435 for work performed by Florio in 2003. Florio has practiced before the Commission on energy-related issues for 25 years. He was admitted to the California Bar in 1978 after earning his law degree (J.D.) from New York University Law School of Law and a Master's Degree in Public Affairs (M.P.A.) from the Woodrow Wilson School of Public

⁹ The Commission adopted a rate of \$350 for Florio in 2001 in D.02-06-070 (2002 Cal. PUC LEXIS 375 *32) and \$385 for 2002 in D.02-09-040 (2002 Cal. PUC LEXIS 599 *11).

and International Affairs at Princeton University. In mid-1990, Florio was named TURN's Senior Attorney, with supervisory responsibility for all of TURN's legal advocacy. In recent years, Florio served on the original governing boards for both the PX and the Independent System Operator (ISO), and was reappointed to the ISO board by the Governor after its reconstitution in early 2001.

TURN believes that Florio's 25 years of legal experience before the Commission, as well as his track record of analytical and advocacy work, and formal recognition of that record by his appointments to the PX and ISO board, equate him to a high-end partner at a law firm. Thus, TURN believes that the comparable market rates should be in the high-end partner billing rates.

TURN justifies the increased attorney fee rate for Florio by citing to the two most recent *Of Counsel* Annual Surveys of the Nations 700 Largest Law Firms, including rates for major firms in San Francisco. The result of the 2000/2001 survey, which reflects data through August 1, 2000, demonstrates that the average partner rate for 2000/2001 is \$360 an hour, with an average low-end rate of \$270 and an average high-end rate of \$450. The 2002/2003 survey, which reflects data through January 1, 2002), demonstrates that the average partner rate is \$400, with an average low-end rate of \$287 and a high-end rate of \$512. TURN argues that because the 2002/2003 survey only reflects data through January 1, 2002, a 5% increase for 2003 rates would make the average partner hourly rate closer to \$420, and the high-end partner hourly rate closer to \$537.

Florio requests a 13% increase over the rate we approved for him in 2002, which is a substantial increase when viewed on a year-to-year basis. However, based upon Florio's experience, his work performed in this proceeding, and a comparison of market rates for attorney of similar experience

and qualifications, we agree with TURN that it is reasonable to award Florio a rate of \$435 per hour for the work performed in 2003.

2. Robert Finkelstein

TURN seeks an hourly rate of \$310 for work performed by Finkelstein in 2001. The Commission has previously approved this rate for work performed by Finkelstein in 2001, and we find this rate reasonable.¹⁰

3. Marcel Hawiger

TURN seeks an hourly rate of \$200 for work performed by Hawiger in 2002. The Commission has previously approved this rate for work performed by Hawiger in 2002, and we find this rate reasonable.¹¹

D. Costs

TURN requests \$3,038.00 for administrative costs associated with its work in this proceeding. The expenses include copying and postage, and are reasonable.

5. Award

We award TURN \$44,140.50, the full amount of its request, as corrected for typographical errors, as follows and as shown in Appendix A to this decision.

¹⁰ See D.02-06-070, 2002 Cal. PUC LEXIS 375 *32.

¹¹ See D.02-09-040, 2002 Cal. PUC LEXIS 599 *11.

Attorneys' Fees

M. P. Florio	8.00 Hours	X	\$350 (2001)	=	\$2,800.00
M. P. Florio	63.0 Hours	X	\$385 (2002)	=	\$24,255.00
M. P. Florio	26.50 Hours	X	\$435 (2003)	=	\$11,527.50
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			Subtotal	=	\$41,102.50

Other Reasonable Costs

Copies	=	\$2,418.00	
Postage	=	\$620.00	
		Subtotal	= \$ 3,038.00
		Total Requested	= \$44,140.50

Consistent with previous Commission decisions, we order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after TURN filed its compensation request and continuing until full payment of the award is made. Because most of TURN's work in this case involved the Edison HPC and PG&E's PX credit, the responsibility to pay this award is apportioned equally between PG&E and Edison.

As in all intervenor compensation decisions, we put TURN on notice that the Commission staff may audit TURN's records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requests compensation, the actual time spent by each

employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

6. Waiver of Comment Period

Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment may be waived because this is an intervenor compensation decision.

7. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Robert Barnett is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN has made a timely request for compensation for its contribution to D.01-09-060, D.02-07-032, D.03-02-035, D.03-08-061, D.03-09-016, and Resolution E-3790.
2. TURN has shown significant financial hardship based on a rebuttable presumption drawn from earlier ALJ rulings.
3. TURN has requested hourly rates for attorneys Florio, Finkelstein, and Hawiger for 2001 or 2002 that are consistent with rates we have approved in prior Commission decisions.
4. TURN has requested an hourly rate for Florio for 2003 that is no greater than the market rate for individuals with comparable training and experience.
5. The costs incurred by TURN are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of §§ 1801-12, which govern awards of intervenor compensation.
2. TURN should recover compensation for its attorneys' fees.
3. TURN should recover compensation for its costs.

4. TURN should be awarded \$44,140.50 for its contribution to D.01-09-060, D.02-07-032, D.03-02-035, D.03-08-061, D.03-09-016, and Resolution E-3790.

5. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$44,140.50 in compensation for its substantial contribution to Decision (D.) 01-09-060, D.02-07-032, D.03-02-035, D.03-08-061, D.03-09-016, and Resolution E-3790 (November 7, 2002).

2. The responsibility to pay TURN's award shall be apportioned equally between Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (Edison). PG&E and Edison shall pay their respective share of TURN's award to TURN within 30 days of the effective date of this order. PG&E and Edison shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, with interest, beginning January 17, 2004, the 75th day after TURN filed its compensation request, and continuing until full payment of the award is made.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision(s):	D
Contribution Decision(s):	D0109060, D0207032, D0302035, D0308061, D0309016, and Resolution E-3790 (November 7, 2002)
Proceeding(s):	A.98-07-003
Author:	ALJ Barnett
Payer(s):	Pacific Gas and Electric Company and Southern California Edison Company

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network	November 3, 2003	\$44,140.00	\$44,140.50	Arithmetic error

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Michel	Florio	Attorney	The Utility Reform Network	\$350	2001	\$350
Michel	Florio	Attorney	The Utility Reform Network	\$385	2002	\$385
Michel	Florio	Attorney	The Utility Reform Network	\$435	2003	\$435
Robert	Finkelstein	Attorney	The Utility Reform Network	\$310	2001	\$310
Marcel	Hawiger	Attorney	The Utility Reform Network	\$200	2002	\$200